PP

v.

HONG LOY TEE

HIGH COURT MALAYA, KUALA LUMPUR
ABDULL HAMID EMBONG J
[CRIMINAL TRIAL NO: 45-19-2004,
45-68-2004 & 45-69-2004]
29 JUNE 2006

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(2) - Whether accused committed offence of trafficking in a dangerous drug - Prima facie case - Whether established*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Sections 12(2), (3), 39A(1), 39B(1), (2) - Possession of drugs - Whether prosecution proved by direct evidence accused was in possession of drugs - Prima facie case - Whether established*

EVIDENCE: *Witness - Non calling of crucial witness - Whether detrimental - Whether there was obligation on prosecution to call essential witnesses in expounding basis of its case - Whether adverse inference under s. 114(g) Evidence Act 1950 could be drawn against prosecution*

CRIMINAL PROCEDURE: *Prosecution - Prosecution's case - Circumstantial evidence - Prima facie case - Whether established*

EVIDENCE: *Expert evidence - Evidence of chemist - 0. 11% of total weight of homogenized substance analysed - PP v. Ooi Teng Chian - Gunalan Ramachandran & Ors v. PP - Whether analysis undertaken by chemists in error - Whether court accepted scientific finding*

The accused person had claimed trial to five separate charges on trafficking in and possession of dangerous drugs. The facts were that a police party conducted a raid at Hotel Caliber in Cheras and had pushed themselves into Room 318 where the accused was found, frightened and confused. SP4 then conducted a body check on the accused and recovered a key from his pocket. On the bed nearest to the door was a box, which upon inspection and analysis, were found to be methamphetamine, a scheduled dangerous drug under the Dangerous Drugs Act 1952 ('DDA'), and was the subject matter of the first charge. Subsequently, the police party brought the accused to his house in Cheras where a search was conducted. Nothing incriminating was found in the

house of the accused. SP4 then went to the house next door and using the key found on the accused, unlocked the padlock on the grille gate of that house. SP4 and his team entered the house, which had three bedrooms. In the third bedroom, there was a wooden desk with three drawers which were locked. SP4 opened the drawers and in the top drawer he found a black PVC pouch bag containing 663 esctasy pills which upon analysis were 89.12 grammes ketamine, the subject matter of the second charge. Next to the pouch bag, in the same drawer, SP4 recovered seven small plastic packages containing heroin, and 90 packages containing pills later analysed to be dangerous drugs of different types and were the subject matter of three s. 12 of the DDA charges. The issues that arose were (1) whether prosecution had successfully established a *prima facie* case through direct evidence to prove that the accused was in possession of the drugs recovered in room 318; (2) whether prosecution had failed to establish a *prima facie* case in respect of the second charge and s. 12 charges, which required proof of possession and (3) whether there had occurred an infirmity in both the chemical analysis of the drugs in this case because only a mere 0.11% of the total weight of the homogenized substance was analysed.

Held:

(1) The fact that the accused was in that small hotel room in proximity to the box containing the drugs , which laid in the open on the bed, without more, could not invoke an inference that he had an intention to deal with the drugs. Such a finding would be against common sense and contrary to decided authorities. On the evidence, the prosecution had failed to show that the accused was in possession of the drugs found on the bed in Room 318. (para 17)

(2) Room 318 was registered in the name of one Lum Ming Sing on the particular date. According to SP9, the investigating officer, he could not trace the registered guest Lum Ming Sing. That mystery guest was checked into Room 318 by SP10 who was the hotel receptionist that night. SP10 in court was unable to say that the accused was the same person as Lum Ming Sing. This mystery guest checked

out of Hotel Caliber at 12.13pm the next day *ie*, some 12 hours after the accused had been arrested. The checking out was done by another hotel receptionist, AZL, who was a crucial witness for the prosecution. There was an obligation on the prosecution to call essential witnesses necessary in expounding the basis of its case. The non-calling of AZL here was thus to its detriment and an adverse inference under s. 114(g) Evidence Act 1950 could be drawn against the prosecution in not fully unwrapping the narration of its case, and creating a doubt on an important issue. The logical conclusion from this gap in the prosecution's case and the adverse inference operative from the non-calling of a crucial prosecution witness was that Room 318 was indeed rented out to Lum Ming Sing who could not be the accused person. (paras 18, 19 & 20)

(2a) The key to Room 318 was never recovered by SP4, neither from the room nor from the accused. This fact lend credence to the claim of the accused that he was in Room 318 then waiting for a friend. This would also explain why the accused was fully clothed with his shoes still on, although it was already past midnight. Also, no personal belongings of the accused was found in Room 318. The logical conclusion and inference that could be made was that Room 318 was not occupied by or in the control of the accused at the moment of his arrest, and that by inference, the accused was there merely as a temporary visitor. (para 21)

(3) As for the accused looking frightened and confused, this was a neutral evidence at best. The accused was in Room 318 waiting for a friend when SP4 and his ambush party barged in pushing the accused down to the floor. There was cause for an ordinary person to feel panic in that situation. This court could not consider the accused's look of fright in the instant case as a reason to infer his knowledge of the drugs. The reasonable and only conclusion was that the accused was neither in control or custody of the said drugs, much less in possession of it. The prosecution had thus failed to establish a *prima facie* charge on the first charge and the accused was accordingly acquitted and discharged on that charge. (paras 22, 23 & 24)

(4) The only evidence put by the prosecution to tie up the drugs found in House No. 3-10-9 with the accused was the fact that that house was rented to him and that the padlock key to the house was found on him. The deputy public prosecutor suggested that the purpose for the accused to occupy two houses next door to each other was to support his criminal activity. This evidence, even if proven, in fact cuts both ways. It could even support the accused's defence that the house was rented for his employee. Since this piece of evidence remained doubtful, and open to both inferences, one that favoured the accused could thus be made. Further, SP4 had only found the padlock key on the accused. Both the room key and drawer keys were not recovered. In view of the doubts created by the prosecution's own case on this issue, an inference could be made that the house was in fact occupied by someone other than the accused. There were also gaping holes in the prosecution's chain of evidence. These factors coupled with the fact that no personal items belonging to the accused was recovered from that house must allow this court to make an inference favourable to the accused – that he was not in occupation or at least not the sole occupier of that house, what more in exclusive use to the room from where the drugs were recovered. (paras 34, 36 & 37)

(5) This court had considered whether the presumption of being an occupier under s. 37(b) DDA could be raised against the accused, but having considered the prosecution evidence in total, there was no sufficient evidence to show that the accused was the person who had the care and management of the house. The background facts did not point to the conclusion that the accused had exclusive use of the room from where the drugs were recovered. The prosecution's case had merely relied on circumstantial evidence which cumulatively, did not point irresistibly to that conclusion which it urged this court to make *ie*, that the accused was in possession of the drugs. It had failed to prove that the accused was in actual possession of the drugs recovered from that house. For these reasons, the prosecution had failed to establish a *prima facie* case in respect of the second charge and the s.12 charges (which similarly required proof of possession) and the accused was accordingly acquitted and discharged of all these charges. (paras 38, 40 & 41)

(6) Relying on the authorities such as *PP v. Ooi Teng Chian* and *Gunalan Ramachandran & Ors v. PP*, the analysis undertaken by the chemists herein was not in error. This court accepted their scientific finding. (para 48)

[Order accordingly.]

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(refd)***
Chan Kwok Keong & Anor v. The Queen [1990] 1 CLJ 411; [1990] 3 CLJ (Rep) 386 CA ***(refd)***
Chan Pean Leon v. PP [1956] 22 MLJ 239 ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(refd)***
Leow Nghee Lim v. R [1956] MLJ 58 ***(refd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Dato Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Hanif Basree Abdul Rahman [2004] 3 CLJ 700 HC ***(refd)***
PP v. Ooi Teng Chian [2005] 4 CLJ 557 CA ***(refd)***
PP v. Tan Ann Chye [2002] 8 CLJ 877 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1)
Dangerous Drugs Act 1952, ss. 2, 12(2), (3), 37(b), (da), (j), 39A(1), 39B(1), (2)
Evidence Act 1950, s. 114(g)

For the accused - Gooi Soon Seng; M/s Gooi & Azura
For the prosecution - Mohd Abazafree Mohd Abbas DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Abdull Hamid Embong J:

The accused person had claimed trial to five separate charges on trafficking in and possession of dangerous drugs as follows.

1. In case No. 45-19-2004 (first charge)

Bahawa kamu pada 1 April 2003, jam lebih kurang 12.15 malam di bilik No 318, Hotel Caliber di alamat No 45-56, Jalan 5/101C Off Jalan Kaskas, Taman Cheras, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 326 gram Methamphetamine, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

2. In case No. 45-69-2004 (second charge)

Bahawa kamu pada 1 April 2003, jam lebih kurang 5.00 pagi di alamat No 3-10-9, Jalan 2/144A, Taman Bukit Cheras, Kuala Lumpur, Wilayah Persekutuan telah mengedar dadah berbahaya iaitu 89.12 gram Ketamine, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(2) Akta yang sama.

3. In case No. 45-68-2004 (the s. 12 charges)

Bahawa kamu pada 1 April 2003, jam lebih kurang 5.00 pagi di alamat No 3-10-9, Jalan 2/144A, Taman Bukit Cheras, Kuala Lumpur, Wilayah Persekutuan sebagai orang yang tidak diberikuasa, telah didapati memiliki dadah berbahaya iaitu 10.12 gram Methamphetamine, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39A(1) Akta yang sama.

Bahawa kamu pada 1 April 2003, jam lebih kurang 5.00 pagi di alamat No 3-10-9, Jalan 2/144A, Taman Bukit Cheras, Kuala Lumpur, Wilayah Persekutuan sebagai orang yang tidak diberikuasa, telah didapati memiliki dadah berbahaya iaitu 0.14 gram 3,4 - Methylenedioxymethamphetamine, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 12(3) Akta yang sama.

Bahawa kamu pada 1 April 2003, jam lebih kurang 5.00 pagi di alamat No 3-10-9, Jalan 2/144A, Taman Bukit Cheras, Kuala Lumpur, Wilayah Persekutuan sebagai orang yang tidak diberikuasa, telah didapati memiliki dadah berbahaya iaitu 3.87 gram Nimetazepam, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 12(3) Akta yang sama.

Facts

[2] In respect of the first charge charge above, these may be briefly stated as follows:

[3] On 31 March 2003, at about 8pm SP4 (ASP Mohd Gauth Ismail) received information on drugs activity being transacted in room no. 318 at Hotel Caliber in Cheras. The informer was from Pahang. As a result, at 9pm, SP4 gathered two teams of 10 police officers from the Bukit Aman and the Pahang contingents to brief them on an ambush plan to apprehend the person or persons involved in the drug transaction at that hotel. According to SP8 (Cif Inspector Mazli) SP4 in the briefing had mentioned that there was one or more targets at that hotel. SP4 headed both teams in the ambush.

[4] At 11 pm the police ambush team arrived at Hotel Caliber. After some observation on the vicinity, according to SP4, he and SP7 (Cif Inspector Ahmad Radzi) together with all those from the Pahang contingent went up to the third floor of the hotel to make an observation of some 15 minutes on Room 318. This part of the prosecution story was however tainted with some uncertainty. According to SP8 (Cif Inspector Mazli) when they arrived at the hotel, he, together with SP7 and another personnel went up to the third floor and SP4 remained downstairs to lead the other team of the ambush party which was stationed there. After SP8 had made an observation for 3 or 4 minutes, SP4 with two other personnel came up and proceeded straight to Room 318, followed by SP7 and SP8. There was no observation for 15 minutes by SP4 as he had earlier alleged in his evidence. Cif Inspector Azhar (from the Pahang contingent) Sjn. Rusdi and Det. Kpl. Yap also entered the hotel. The rest of the ambush team waited outside the hotel.

[5] On entering the hotel, SP4 and his team went up to the third floor before entering Room 318. No check was made with the hotel receptionist as to whom that room was registered with. It transpired later, through the evidence of SP10, the hotel receptionist on duty that night, that Room 318 was registered in the name of one Lum Ming Sing.

[6] SP4 stated that during the observation period, he had not seen anyone entering or leaving Room 318 before he raided that room. When he knocked on the room door the accused opened the door and SP4 pushed himself into the room causing the

accused to fall. SP4 introduced himself as a police officer and directed SP7 to handcuff the accused. The accused looked frightened and confused.

[7] SP4 then conducted a body check on the accused and recovered a key from his pocket. There were 2 beds in Room 318. On the bed nearest to the door was a box, which upon inspection SP4 found to contain tiny crystals suspected to be drugs commonly known as 'syabu'. These drugs upon analysis were found to be methamphetamine, a scheduled dangerous drugs under the Dangerous Drugs Act 1952, and which is now the subject of the first charge (case No. 45-19-2004).

[8] At the time of his arrest in Room 318, which was just after midnight, the accused person was fully clothed and was wearing his shoes. Apart from a single key recovered from the accused's pocket, nothing else was found on him. SP4 stated that he conducted a search beneath the mattress, underneath the television, the bedside tables, in the ceiling and a sidetable in the bathroom. However he could not remember searching the wardrobe. Under cross examination, SP4 said that he was not aware if Room 318 had a wardrobe, but when it was put to him by learned counsel that he did not search the wardrobe, he disagreed. But when it was suggested that there were some clothing in the wardrobe, SP4 replied that he did not know. Remarkably, SP7 in his evidence stated that there were clothing in the wardrobe and that SP4 had opened it. However, SP7 was not certain how many shirts were in that wardrobe. Thus, another discrepancy in the evidence of the prosecution main witnesses. SP4 however agreed to the defence suggestion that no personal effects belonging to the accused was found in Room 318. SP4 also stated that the accused had told him that he was in Room 318 to meet a friend.

[9] There was one aspect of the prosecution evidence which this court had found to be most unsatisfactory. Learned counsel of the accused person in putting across the defence case had suggested to SP4, SP7 and SP8 that in its operation at Hotel Caliber that night, the police had arrested three other persons and had named them as Lam Pek, Ah Ngan and Lai Wai Kong. The last named person was said to have been an employee of the accused and was arrested in a car parked near the said hotel. It

is now necessary to quote the answers given by these police witnesses in response to the questions put by counsel in respect of those other arrests at the hotel.

[10] This was what SP4 said on this issue:

> Selain daripada OKT saya tak pasti ada sesiapa lagi ditangkap di hotel.
>
> S: Ada 3 lagi di hotel pada malam itu.
>
> J: Tak tahu (p. 53 notes of evidence)
>
> Team yang di luar hotel diketuai oleh Cif Inspektor Mazli. Selepas operasi ini, saya tak tahu sampai ke hari ini yang ada tangkapan lain dibuat di luar hotel pada malam itu. (page 56 notes of evidence).
>
> Katakan: Kamu tahu ada 2 orang ditangkap di Hotel Caliber bersama OKT dan tindakan diambil terhadap mereka di bawah Akta Kediaman Terhad?
>
> J: Saya tak tahu (p. 56 notes of evidence).

To the same line of questioning, SP7 (Cif Inspektor Ahmad Radzi) responded as follows:

> Katakan: Semasa OKT ditangkap juga ada tangkapan lain di Hotel Caliber?
>
> J: Tak ingat.
>
> Katakan: Ada 3 tangkapan malam itu?
>
> J: Saya tak tahu.
>
> Katakan: Ketiga-tiga orang yang ditangkap itu juga dibawa balik ke IPD Cheras?
>
> J: Saya tak tahu (p. 70 notes of evidence).
>
> Katakan: Dalam masa 3 jam itu ada 3 tangkapan lain dibuat di Hotel Caliber dan ditahan di lokap IPD Cheras?
>
> J: Saya tak pasti (p. 72 notes of evidence).

And, this was what SP8 (Cif Inspektor Mazli) said to the same questions:

A Katakan: Ada 3 tangkapan bersama OKT di Hotel Caliber dan ditahan di lokap Balai Cheras, seorang bernama Lai Wai Kong?

J: Tak tahu.

B S: Sehingga hari ini kamu tahu ada tangkapan yang lain itu di Hotel Caliber?

J: Tak tahu. Tak pernah dengar.

[11] It strikes me as most odd that the three most senior police C officers involved in that ambush, including SP4 who was the superintending officer, could not give a direct "yes or no" answers to those direct questions. Instead they chose to give the court the usual "I don't know" or "I am not sure" (tak tahu and tak pasti) answers which can only be taken either as being indifferent in D narrating the actual facts or at worst, downright lying. From my observation of these witnesses on this aspect of the case, they had not been truthful, thus shaking their own credibility. At one point, this court even had to remind SP4 that, as the most senior officer in that operation, surely he could give a simple 'yes or no' E answer to those questions. It is difficult for me to accept that SP4 did not know or was not sure of those other arrest even until today. If there had been such arrests, he could have confirmed it, if there were none, a simple "no" could have answered those queries. Even if these witnesses were to confirm those arrests, I F do not see how that fact would damage the prosecution case. Instead these witnesses chose to give vague answers which left this court wondering about their veracity. This is most exasperating for any trial judge whose responsibility it is to seek the true facts. It is incumbent on witnesses to hold their G testimony true to their affirmation that they would tell only the truth, nothing but the truth. Only then can one get a fair trial and a just decision from the court.

[12] Now, those discrepancies adverted to earlier in this H judgment, although standing alone may seem minor and immaterial would have to be considered in my assessment of their credibility and reliability on this question of the other arrests, which in my view is a fact in issue. Assessment of a witness's truthfulness is a task which must be undertaken by this court, even at this stage I of the trial. This is to meet the requirement of a maximum evaluation of the prosecution's case in order to determine whether it has successfully established a *prima facie* case (see *Balachandran v. Public Prosecutor* [2005] 1 CLJ 85).

Prima facie Case

[13] The learned deputy prosecutor in his submission said that the prosecution had successfully established a *prima facie* case through direct evidence to prove that the accused was in possession of the drugs recovered in Room 318, and by applying the presumption under s. 37(da) was therefore presumed to be trafficking in the same drugs. It was submitted that the accused was in physical possession on the drugs recovered in Room 318 for the following reasons:

i) Only the accused was found in Room 318.

ii) The observation by the police for about 15 minutes before entering Room 318 did not show anyone else entering or leaving that room.

iii) The box containing the drugs laid on the bed and was not sealed or concealed.

iv) The question arose as to what the accused was doing in a room that was not registered in his name?

v) The accused looked frightened and confused upon being confronted by the police.

[14] The learned deputy submitted that since the prosecution had proven by direct evidence that the accused was in possession of the drugs recovered in Room 318, which is 326 grammes of methamphetamine, a scheduled dangerous drugs under the DDA, the presumption of trafficking under s. 37(da) is thus applicable against the accused.

[15] It is now settled law that this court is tasked with the duty to evaluate the prosecution evidence on a maximum evaluation, and not merely to skim the surface of that evidence alone. It has also been held by our highest court that the defence ought not to be called merely to clarify doubts arising from the prosecution case (see *Balachandran v PP*). The prosecution also needs to prove its case by adducing evidence capable on its own of convicting the accused person in the event he remained silent upon being called in his defence, short of which it would have failed to raise a *prima facie* case under s. 180(1) of the Criminal Procedure Code (see *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734, *PP v. Hanif Basree Abdul Rahman* [2004] 3 CLJ 700, also see *Balachandran v. PP*, citation above).

[16] On the evidence, it is my finding that the prosecution had failed to show that the accused was in possession of the drugs found on the bed in Room 318, for the following reasons:

[17] His proximity to the box (and this conclusion is based entirely on the small size of that room) could only bring this court to the finding that the accused may merely be presumed to have a knowledge merely of that box found on the bed, not even its contents. It is trite that mere knowledge without any further incriminating evidence cannot constitute possession, (see *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43). This knowledge is but one ingredient of possession, essential in proving the mental element, as stated by Thomson J in *Chan Pean Leon v. Public Prosecutor* [1956] 22 MLJ 239:

> "Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition, page 304):
>
> A movable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention.

Similarly in this case the fact that the accused was in that small hotel room in proximity to the box containing the drugs, which laid in the open on the bed, without more, could not invoke an inference that he had an intention to deal with the drugs. Such a finding would be against common sense and contrary to decided authorities.

[18] Next is to consider whether the facts adduced by the prosecution can lead this court to infer that the accused was in custody or control of the said drugs. These two primary elements needed to be proved by the prosecution beyond any reasonable doubt for this court to arrive at a finding of possession.

[19] Room 318 was registered in the name of one Lum Ming Sing, on the particular date. This person had checked in at 19.28 hours (7.28pm) on 31 March 2003 and checked out on 1 April 2003 (12.13pm). The accused was arrested in that room shortly after midnight (12.15am according to SP4). The accused was fully clothed with his shoes on. SP4 also confirmed that the accused had told him that he was in that room waiting for a friend. According to SP9, the investigating officer, he could not trace the registered guest Lum Ming Sing, although an attempt was made with the National Registration Department. That mystery guest was checked into Room 318 by SP10 who was the hotel receptionist on that night. SP10 in court was asked to identify the accused but she was unable to say that the accused was the same person as Lum Ming Sing. This mystery guest checked out of Hotel Caliber at 12.13pm the next day, ie, some 12 hours after the accused had been arrested. The checking out was done by another hotel receptionist whose name carry the initials 'AZL' (see exh. P65 ie, the Hotel Folio). Upon checking out RM100 was returned to that guest which is the balance of a RM200 cash deposit paid by the guest upon checking in and minus the RM100 charged for the room tariff. Surely a receipt for that deposit would have to be submitted to the receptionist before the balance of RM100 was handed back to that guest. This is a common practice but was not adduced in evidence. In my view, 'AZL' is a crucial witness for the prosecution in the narration of its case to clear any doubt that Lum Ming Sing is actually the accused under an assumed name, as the learned deputy seems to suggest in his submission.

[20] There is an obligation on the prosecution to call essential witnesses necessary in expounding the basis of its case (see *PP v. Chia Leong Foo* [2000] 4 CLJ 649). The non calling of 'AZL' here is thus to its detriment and an adverse inference under s. 114(g) Evidence Act can be drawn against the prosecution in not fully unwrapping the narration of its case, and creating a doubt on an important issue. That suggestion by the learned deputy cannot be further from the truth, since someone else had checked out of Room 318 and accepted the balance on the deposit some 12 hours later. The logical conclusion from this gap in the prosecution's case, and the adverse inference now operative from the non calling of a crucial prosecution witness, is that Room 318 was indeed rented out to Lum Ming Sing who cannot be the accused person.

[21] The key to Room 318 was never recovered by SP4, neither from the room nor from the accused. This fact lends credence to the accused's claim that he was in Room 318 then waiting for a friend. This would also explain why the accused was still fully clothed with his shoes still on, although it was already past midnight. If it was he who checked in Room 318 some 5 hours earlier, surely he would still not have his shoes on. Also, no personal belongings of the accused was found in Room 318. The logical conclusion and inference that can be made is that Room 318 was not occupied by or in the control of the accused at the moment of his arrest, and that by inference, the accused was there merely as a temporary visitor.

[22] As for the accused looking frightened and confused, this in my view is a neutral evidence at best (see *PP v. Ooi Teng Chian* [2005] 4 CLJ 557). Conduct may be tantamount to an admission by an accused person of his guilt of an offence and as such is admissible evidence (see *Chan Kwok Keong & Anor v. The Queen* [1990] 1 CLJ 411; [1990] 3 CLJ (Rep) 386). In the instant case, the accused was in Room 318 waiting for a friend when SP4 and his ambush party barged in pushing the accused down to the floor. There was cause for any ordinary person to feel panic in that situation. In *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1 the Supreme Court held that the conduct of the appellant running away could "equally be consistent with the appellant being in a state of panic" and that an innocent person could foolishly react in that way. As such, this court cannot consider the accused's look of fright in the instant case, as a reason to infer his knowledge of the drugs.

[23] Having scrutinised all these facts on a maximum evaluation scale, the reasonable and only conclusion this court can make is that the accused was neither in control or custody of the said drugs, much less in possession of it.

[24] For these reasons, it is this court's finding that the prosecution had failed to establish a *prima facie* charge on the first charge and the accused is accordingly acquitted and discharged on that charge.

The Second Charge And The s. 12 Charges

[25] The facts now continue. After his arrest, the accused was brought to the district police headquarter at Cheras where a preliminary interrogation was held. That was what SP4 said in evidence, which this court accepted. SP7 however said that after his arrest the accused was brought directly to his house (see p. 72 notes of evidence). Another contradiction, which although immaterial, makes this court wonder if these witnesses took their duty seriously in relating the true facts seriously. At about 5am on 1 April 2003 the police party led by SP4 brought the accused to his house in Cheras where a search was conducted. When the police party arrived at the accused's house, the front door was opened by an Indonesian woman. Nothing incriminating was found in the accused's house. SP4 then went to the house next door, (No. 3-10-9) and using the key found on the accused, unlocked the padlock on the grille gate of that house. The wooden door was not locked. SP4 and his team then entered the house. No evidence was led as to why SP4 went to this second house ie, the crime scene. There was nobody in that house. That house has three bedrooms (see sketch plan, exh. P25) the bedroom marked 'E' in P25, according to SP4 was empty. The bedroom marked 'F' in P25 contained a mattress, a TV, a fan, some clothings and tools. These items indicated that that room was occupied by someone. SP4 also said that no personal items belonging to the accused were recovered from that house. The third bedroom was locked and SP4 directed SP7 to break open the door. According to SP4, the accused had told him that he had lost the key to that room. In that room there was a wooden desk with three drawers which were locked. SP4 forced open the drawers and in the top drawer he found a black PVC pouch bag (exh. P26) which was found to contain 663 ecstacy pills. These pills upon analysis by SP5, the chemist, were found to be 89.12 grammes ketamine, now the subject of the second charge.

[26] Next to the pouch bag, in the same drawer, SP4 recovered 7 small plastic packages containing heroin, and 90 packages containing pills later analysed to be dangerous drugs of different types, and which are now the subject matter of the three s. 12 charges.

[27] On 2 April 2003 at 3.20pm, SP9, the investigating officer, Cif Inspektor Lee Hock Long (SP9) together with SP4 and a police photographer went to the house from where the drugs were recovered. The grille and front door were not locked. SP9 drew a sketch plan on the layout of the rooms (exh. P25). According to SP9, from the room marked 'E' in P25, he recovered a T shirt and a pair of jeans. This evidence was in contradiction to that of SP4 who found that room 'E' was empty when he searched it the day before. SP9 also denied when it was put to him that room marked 'F' in P25 contained some clothings, a mattress, a TV and a fan, thus again contradicting SP4's evidence.

[28] In his submission learned counsel for the accused had submitted that these contradictions were material and was not explained by the witnesses. In my view they were not so material in the sense that the prosecution's case fall flat because of them. What this court finds however is that there were personal items in that house whose ownership were not determined by the police. This court also makes a finding that the presence of those items gives rise to an inference that the said house was occupied. Now, as for the clothings recovered by SP9 from room 'E', since the house was left unlocked by the raiding party and that SP4 had said that room 'E' was empty and that no personal belongings of the accused was recovered from that house in his raid, could it be that someone had been in that room from the time the raiding party left the house in the wee morning of 1 April 2003 till the late afternoon on 2 April 2003 when SP9 went to that house for his investigations? This question keeps nagging me and cast a doubt as to whether it was the accused who occupied that house, or whether it was someone else, or whether they were in joint-occupation.

[29] The clothes recovered from room E, according to SP9 were hanging at the window. Surely SP4 could not have missed their presence. SP4 was sure that room marked 'E' was empty. Was SP4 mistaken? Could SP9 be lying?

[30] SP9 said that he fitted those clothing onto the accused and took a photograph of him with those clothes on (exh. P23). They seem to fit but, as submitted by learned counsel the T shirt was of a loose cut and could fit anyone with average body size like the accused. I accept this submission, and will not make any conclusion incriminating of the accused from that fitting exercise alone. There was however no further investigations done on that clothes recovered. Further, SP4 had earlier testified that no personal belongings of the accused was recovered from that house.

[31] The investigation on that house was in fact left wanting with several nagging questions unanswered. Why did SP9 not take photographs of all the rooms in that house, a simple exercise that would have given some answers on the contradictions in respect of the items seen by SP4 in the house. Why did SP4 leave the house unlocked, thus making it accessible to anyone before the arrival of the investigating officer? Surely a scene of crime needs to be secured? If SP4 had intended to leave the house unlocked, why didn't he seize the items which he said he saw in room 'F'? Surely, these items would have assisted SP9 in investigating into the occupier of that house. Why was the desk from which the drugs were recovered left behind, unsecured in an unlocked house? These unexplained actions by SP4 and SP9 had left this court searching for answers.

[32] The prosecution had led evidence through the owner of that house (SP6) to show that he had rented that house to the accused at the relevant time. The wooden desk from which the drugs were recovered belonged to the owner and he had left it behind. The desk was without any lock then. SP6 also testified that he did not know who actually occupied the house. SP6 also said that the accused had lived in the house next door (No. 3-10-10) for over a year and had an ironworks business.

[33] The accused had put across a defence that the house was rented for his employee, one Lai Wai Kong, the person whom it was earlier suggested was arrested in a car parked below Hotel Caliber.

[34] As earlier stated, house No. 3-10-9, from where the drugs were recovered was certainly in occupation. The only evidence put by the prosecution to tie up the drugs with the accused was the fact that that house was rented to him and that the padlock key to the house was found on him. The first question that came

to my mind was why was there a need for the accused to occupy two houses next door to each other? The learned deputy in his submission suggested that the purpose was to support his criminal activity. This evidence, even if proven, in fact cuts both ways. It could even support the accused's defence put to the prosecution witness that the house was rented for his employee. Although suggestions put by the defence to prosecution's witnesses in cross examinations, are only indicative of the defence case and cannot be a substitute for evidence if repudiated (see *PP v. Dato Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215), it has been held however in *PP v. Chia Leong Foo* [2000] 4 CLJ 649, that "it would be prudent for the prosecution to adduce such evidence in the course of its case as is reasonably available to it to rebut the defences suggested because the legal burden on the prosecution does not end once it has made out a *prima facie* case." Since this piece of evidence remains doubtful, and open to both inferences, one that favours the accused could thus be made.

[35] The next question is whether it was a possibility that the house was used as a residence of his employee? If the accused was in exclusive occupation of that house, why was the key to the locked room not recovered from him? According to SP4, the accused had told him that he had lost the key to that room. This was a statement purportedly made by the accused after his arrest and without any caution. This piece of evidence would thus amount to a confession and should not have been admissible. In any event, in view of SP4's evasive answers on the question of the other arrests made at Hotel Caliber earlier that morning, and this court reservation on his credibility, I would now certainly view this piece of evidence with circumspect and suspicion and reject it as both unreliable and prejudicial to the accused.

[36] SP4 had only found the padlock key on the accused. Both the room key and drawer keys were not recovered. In view of the doubts created by the prosecution's own case on this issue, an inference could now be made that the house was in fact occupied by someone other than the accused.

[37] The other nagging question remaining is why the need for the accused to maintain another room next door to his house? In my view this could be answered if the Indonesian woman who lived with the accused (according to SP6's evidence) had been called as a witness to clear this doubt. Unfortunately, this was not

done, thus leaving another gaping hole in the prosecution's chain of evidence. These factors coupled with the fact that no personal items belonging to the accused was recovered from that house must now allow this court to make an inference favourable to the accused – that is he was not in occupation or at least not the sole occupier of that house, what more in exclusive use to the room from where the drugs were recovered.

[38] This court had also considered whether the presumption of being an occupier under s. 37(b) DDA could be raised against the accused, but having considered the prosecution evidence in total, I could not find that there was sufficient and undoubtful evidence to show that the accused was the person who had the care and management of the house.

[39] The prosecution needed to prove by direct evidence that for the second charge the accused was trafficking in such drugs as submitted by the learned deputy, by performing an act found in the definition of trafficking under s. 2 DDA. That however needed a proof of possession of the said drugs by the accused. In *Public Prosecutor v. Chia Leong Foo* [2000] 4 CLJ 649, it was held that:

> It must be observed that most of the acts that constitute 'trafficking' as defined in s. 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession unlike, for instance, the sale and supply of dangerous drugs which need not necessarily involve possession as demonstrated by *Pendakwa Raya v. Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560. It follows that a person cannot keep, conceal, store, transport or carry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them. ...
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> As most of the acts that constitute trafficking involve the prerequisite element of possession the initial matter that requires proof by the prosecution is possession. The ingredients necessary to establish possession have been considered in numerous cases. I do not find it necessary to go into them in detail except for the element of *mens res* that requires to be proved. In this regard Thomson J (as he then was) said in *Chan Pean Leon v. PP* [1956] MLJ 237 at p 239:
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> > Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. And for this purpose as was pointed out by Gordon-Smith Ag CJ in the case of *Toh Ah Lam and Mak Thim v.*

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> *Rex* [1949] MLJ 54, it is necessary to prove that the person in possession knows the nature of the thing possessed.

[40] The prosecution thus needs to firstly prove that the accused
B was physically in custody and control of the said drugs. There must therefore be clear and undoubted proof of these two ingredients, which this court can make a finding beyond a reasonable doubt. Taylor J in *Leow Nghee Lim v. R* [1956] MLJ 58 gave the following definition to these two words:

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> Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies
D knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

In my view to arrive at these two elements of possession, the prosecution needed first of all, due to the facts peculiar to the instant case, to clear any doubts, in respect of the occupation of
E that house by the accused. Next is to prove that he had the exclusive use of the room from where the drugs were recovered (see *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168). The background facts did not however point to that conclusion, in fact they were clouded with doubts. Surely the
F proof of tenancy to that house alone could not arrive at the conclusion that the accused was its occupier? This was a case where perhaps a fingerprint dusting to the house, if undertaken, could have cleared any doubt as to who was the exclusive occupier to that house. Alas, none was done here. In the end, I
G found that the prosecution's case had merely relied on circumstantial evidence which cumulatively, did not point irresistibly to that conclusion which it now urged this court to make, ie, that the accused was in possession of the drugs. Having evaluated the prosecution evidence, it is my finding that it has failed to prove
H that the accused was in actual possession of the drugs recovered from that house.

[41] For these reasons it is held that the prosecution had failed to establish a *prima facie* case in respect of the second charge and
I the s. 12 charges, (which similarly require proof of possession) and the accused is accordingly acquitted and discharged of all these charges.

Section 37(j) DDA

[42] Learned counsel of the accused also submitted that there had occurred an infirmity in both the chemists analysis of the drugs in this case because only a mere 0.11% of the total weight of the homogenised substance was analysed. As such the prosecution cannot rely on the presumption under s. 37(j) of the DDA. That section said:

> When any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

Learned counsel urged this court to follow the decisions in *PP v. Tan Ann Chye* [2003] 5 MLJ 1, *Loo Kia Meng v. PP* [2000] 3 CLJ 653 and *Leong Bon Huat v. PP* [1993] 3 CLJ 603.

[43] Learned deputy submitted that the presumption under s. 37(j) is not applicable since the chemists had actually analysed the drugs from all the packages by taking representative samples from all the drugs which had been homogenised. Both the chemists had testified that the percentage of the representative samples taken for analysis would not affect the outcome of the analysis and even if less than 0.1% were analysed the result would be the same.

[44] Learned counsel had overlooked two recent decisions of the Court of Appeal which had dealt with this issue, whose findings this court adhere to.

[45] In *PP v. Ooi Teng Chian* [2005] 4 CLJ 557 it was held:

> Under s. 37(j) of the Act a minimum of 10% of the contents of the receptacles must be analysed. The percentage referred to in s. 37(j) of the Act is a reference to the receptacles and not the total weight of the drugs found or the total weight of the samples taken. Where representative samples are taken from each

receptacle it is for the chemist to determine the sufficiency of the required weight. That was the procedure followed in this case and was the correct course of action adopted. The samples analysed by the chemist were therefore sufficient in law to support her conclusion.

[46] The above case had followed an earlier decision in *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551 where Abdul Hamid Mohamad JCA held that:

> In *Leong Boon Huat v. PP* the court did not lay down the rule that 10% of the total weight of the plant material must be taken as sample for the purpose of tests. However, in the circumstances of that particular case the amount taken was found to be adequate by the court. In the absence of a specific provision of the law, it should be the chemist who determines the adequate quantity that should be taken as samples for the purpose of carrying out tests. *Leong Boon Huat v. PP* is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. There is no provision whatsoever in the DDA which requires at least 10% of the total weight of the substance in question be taken out for the purpose of analysis. The 10% mentioned in s. 37(j) of the DDA refers to 'receptacles' when the drug is contained in a number of receptacles, not to the weight, and not where the drug is found in one package only. *PP v. Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 (SC) (fold); *Au Ah Lin v. PP* [1963] 29 MLJ 365 (FC) (fold); *Leong Boon Huat v. PP* [1993] 3 MLJ 11 (not fold); *Loo Kia Meng v. PP* [2000] 3 CLJ 653 (not fold). (pp. 577 g-h & 578 a-d).

[47] In a separate judgment Abdul Aziz Mohamad JCA also came to the same finding. The following passage from the learned judge's judgment is now reproduced and in my view, has settled the confusion on the interpretation of s. 37(j):

> In prosecutions for offences involving the possession of a dangerous drug, it is important for the prosecution to prove that the substance is a particular dangerous drug and the weight of it, because the penalty for the offence depends on the weight of the particular dangerous drug. The proof is furnished by the evidence of a chemist, an expert who examined and analysed the substance. Cross-examination of the chemist will seek to find fault with the manner in which the chemist arrived at his conclusion in order to create a doubt in the mind of the court as to the nature of the substance or, which I perceive is more often the case, as to the weight of the particular dangerous drug, because the severity of the penalty depends upon the weight. The approach that the court

should take towards the evidence of the chemist as an expert has been stated by the Supreme Court in *Public Prosecutor v. Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391, which refers back to another Supreme Court decision, that in *Munusamy v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221. My learned brother has set out the essential passage from *Lam San*, which includes the essential passage from Munusamy. Essentially the approach should be to accept the evidence of the chemist as true even though the chemist has not shown in detail what he did in the laboratory, unless the evidence is so inherently incredible that no reasonable person can believe it to be true or there is evidence that contradicts from another expert.

No law or statute has laid down the process which a chemist is bound to use in order to prove the nature of a substance as being or as containing a particular dangerous drug or the weight of the dangerous drug in a bulk of the substance. The process belongs to the realm of science and is devised according to the discipline and principles of science. Section 37(j) of the Dangerous Drugs Act 1952, which my learned brother has set out, is so worded that it is not intended to be a mandatory method of analysing a substance to establish that it contains a particular dangerous drug or to establish the amount of it. It is intended to provide a facility that may be used. It is intended to facilitate, not to shackle. Leaving aside for the moment the exact circumstances in which the section is intended to apply, the basic idea is that, of the whole you need to analyse only so much, and if you do that it shall be presumed, until the contrary is proved, that the result is good for the whole. The presumption is mandatory, if you analyse just that much, and there lies the facility, but the section does not make it mandatory that proof as to the whole be established by resort to the mandatory presumption. Science may find other ways of proof in respect of the whole that are more thorough and conclusive.

Coming now to specifics, two things need to be said about the section. First, even if the facility of the presumption is to be resorted to, it is not in every case that it may be resorted to. It may be resorted to only where the substance "is contained in a number of receptacles". It is a facility only for such a situation. Second, if the section is to be resorted to in such a situation so as to have the benefit of the presumption, you have to analyse "samples of the contents of a number not less than ten per centum of such receptacles". The samples to be analysed are samples of the contents of a number of the receptacles. The number, that is the number of receptacles, must be not less then ten per centum of the receptacles. The ten per centum therefore

A refers to the number of receptacles. You have to take samples from that number of receptacles. As to how much the sample is to be taken from each receptacle and analysed, the section does not specify. The ten per centum does not quantify the sample.

B **[48]** Relying on these recent authorities, it is my finding that the analysis undertaken by the chemists in this case was not in error, and this court accepts their scientific finding.

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